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No. 96-479

In the Supreme Court of the United States

OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM E. KENNARD
General Counsel

CHRISTOPHER J. WRIGHT
Deputy General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

STEWART A. BLOCK
Counsel
Federal Communications Commission
Washington, D.C. 20554

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QUESTION PRESENTED

Whether the Federal Communications Commission correctly determined that petitioner had failed to act with due diligence in constructing a direct broadcast satellite system.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unpublished, but the judgment is noted at 84 F.3d 1452 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 6, 1996. A petition for rehearing was denied on June 27, 1996. Pet. App. 10a-11a. The petition for a writ of certiorari was filed on September 24, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Communications Commission (FCC) first authorized the development of direct broadcast satellite (DBS) systems—satellite systems that deliver video programming directly to viewers' homes by means of backyard receiving dishes—in 1982. Since then, the FCC has required any DBS permittee to "proceed with diligence" in completing construction of DBS systems and implementing DBS service. 47 C.F.R. 100.19. Specifically, each DBS permittee must meet two separate due diligence deadlines: first, it must complete contracting for the construction of DBS satellites within one year of the permit grant; and, second, it must complete construction of, and begin operating, its DBS system within six years of the permit grant, "unless otherwise determined by the Commission upon proper showing in any particular case." *Ibid.* A "[t]ransfer of control of the construction permit [to another entity] shall not be considered to justify extension of these deadlines." *Ibid.*; see *In re Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, 90 F.C.C.2d 676 (1982) (implementing "due diligence" requirement).

In the 14 years since the Commission adopted the DBS rules, several DBS permittees have violated one or the other of these due diligence requirements. Whether by cancelling construction permits or by rescinding satellite orbital assignments, the Commission has taken action eight times against permittees that have failed to comply with the first

requirement.[1] With respect to the second due diligence requirement—actual operation of the DBS system within six years of a permit grant—the Commission was initially more flexible. As the first group of permittees approached the end of the initial six-year construction period in the late 1980s, the Commission granted extensions to permittees that had proceeded diligently toward construction and operation of their DBS systems but had fallen short of the construction deadline because of factors beyond their control. See, *e.g.*, *In re United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858 (1988) (*USSB I*).

At the same time, however, the Commission recognized that the number of new DBS applicants would soon exceed the scarce supply of available channels and orbital locations needed for DBS service. Accordingly, the Commission warned DBS permittees of the "need for stricter enforcement of the construction progress requirements of the DBS rules." *USSB I*, 3 FCC Rcd at 6861 (¶ 19). The Commission further cautioned permittees that uncertainties in the business market could no longer excuse failure to comply with the due diligence requirements. *Id.* at 6859 (¶ 11).

2. On December 6, 1984, the Commission granted a six-year DBS construction permit to petitioner Advanced Communications Corporation, which, like other such permits, was subject to the due diligence requirements. *In re Satellite Syndicated Systems*,

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[1] See *In re CBS, Inc.*, 99 F.C.C.2d 565, 571-573 (1984); *In re Tempo Enterprises, Inc.*, 1 FCC Rcd 20, 21 (1986); *In re RCA American Communications, Inc.*, 2 FCC Rcd 1204, 1205 (1987); *In re Continental Satellite Corp.*, 4 FCC Rcd 6292, 6296 (1989); *In re Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680, 6687 (1993), recon. denied, 10 FCC Rcd 12,743 (1995).

Inc., 99 F.C.C.2d 1369, 1387 (¶ 55) (1984). In 1986, the Commission determined that petitioner had satisfied the first such requirement by contracting for the construction of two satellites. *In re Tempo Enterprises, Inc.*, 1 FCC Rcd 20, 20-21 (¶¶ 5-7) (1986).

In early 1990, however, anticipating the expiration of its initial six-year construction permit, petitioner requested a four-year extension—to December 7, 1994—of its deadline to complete construction of its DBS system. C.A. App. 296. In requesting that extension, petitioner admitted that it had not begun construction of any of the satellites specified in its 1986 contract. Nonetheless, it cited several "factors outside its control" to support its extension request, and asserted that it had spent "considerable" energy and funds in advancing satellite technology, including DBS digital technology. *Id.* at 308-315.

The Commission granted petitioner's extension request. *In re Advanced Communications Corp.*, 6 FCC Rcd 2269 (1991). It found that "[a]t this stage of the development of the DBS industry we believe that the efforts expended by [petitioner] and the impediments and delays it has experienced are sufficient to demonstrate" that petitioner had pursued its DBS system with due diligence. *Id.* at 2274 (¶ 30). Yet the Commission specifically warned petitioner that, "[i]n the future, continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization." *Ibid.* (¶ 31).

During the entire four-year extension period granted by the Commission, petitioner took no concrete measures to construct its own DBS system. Indeed, petitioner made no payments at all for the construction of DBS satellites, even though, in its

extension request, it had set forth a detailed payment schedule and a series of construction milestones. See 6 FCC Rcd at 2272 (¶ 17). In April 1994, three months after the date by which petitioner originally promised to have completed construction of its first satellite, petitioner submitted a revised schedule under which satellite construction would not even *start* until April 1995, *after* the December 1994 expiration of petitioner's extended construction permit. C.A. App. 344-349.

Thus, shortly before that expiration date, petitioner requested a second four-year extension of time. C.A. App. 366. Petitioner conceded that it had not yet begun construction of satellites, a failure that it attributed to its unsuccessful attempt to negotiate a joint-venture agreement with another permittee, EchoStar Satellite Corp. *Id.* at 368-370. Petitioner based its extension request principally on its technological and lobbying efforts in support of DBS service. *Id.* at 370-375.

More than a month after filing its second extension request, and just a few weeks before the expiration of its construction permit, petitioner entered into an agreement with Tele-Communications, Inc. (TCI) under which, in effect, TCI would pay petitioner $45 million in stock for the use of petitioner's channel and orbital position assignments in providing TCI's own broadcast service. See Pet. App. 34a-36a (¶¶ 38-42) (describing the various proposed alternative transactions). Petitioner claimed that this agreement satisfied the due diligence requirement. Specifically, it claimed due diligence credit for the two nearly completed satellites that TCI had procured for its own use at its own orbital location but had agreed to divert to petitioner's different orbital location upon fulfillment of the agreement. C.A. App. 417.

3. a. The FCC's International Bureau denied petitioner's request for a second extension on the ground that petitioner had failed to meet its due diligence obligations. Pet. App. 79a-91a. The Bureau found that petitioner's own business decisions had foreclosed petitioner's progress toward the launch and operation of its DBS system. *Id.* at 85a-89a (¶¶ 13-19). The Bureau also determined that petitioner could not rely upon the proposed TCI transaction to satisfy its due diligence obligations. *Id.* at 89a-90a (¶ 21). Accordingly, the Bureau cancelled petitioner's construction permit and determined that petitioner's requests to assign and modify its permit were moot. *Id.* at 91a (¶¶ 23-24).

b. Petitioner appealed to the full Commission, which, in a 3-2 vote, affirmed the Bureau's decision. Pet. App. 12a-78a. The Commission found that, despite the Commission's earlier warnings to begin construction immediately, "[petitioner] has not achieved any concrete progress toward the actual construction and operation of its DBS system." See *id.* at 32a-33a (¶¶ 35-37), 37a-38a (¶¶ 44-45). The Commission rejected petitioner's claim that its agreement with TCI sufficed to meet petitioner's own due diligence requirements. That agreement, the Commission found, constituted nothing more than TCI's attempt to use petitioner's channels and orbital location for its own DBS service. *Id.* at 34a (¶ 39). Because TCI would pay all costs for construction, launch and operation of the satellites, because TCI would have title to those satellites, and because petitioner would dissolve upon completion of the proposed transaction (see *id.* at 34a-35a (¶¶ 39-40)), the Commission concluded that "[petitioner's] sole contribution to this

DBS system appears to be its authorization to use public resources." *Id.* at 35a-36a (¶ 41).[2]

The Commission therefore determined that the public interest required cancellation and reassignment of petitioner's DBS channels and orbital location. The Commission concluded that "[t]he DBS due diligence rules were designed to ensure that permittees would go forward expeditiously with the development of their systems. In this case, [petitioner's] lack of due diligence has resulted in a warehousing of spectrum from which it now seeks to profit. Such a result would be contrary to the public interest in the prompt and efficient use of DBS spectrum to provide a competitive service to the public." Pet. App. 46a (¶ 64).

Having denied petitioner's permit extension request, the Commission briefly addressed a separate issue: the disposition of petitioner's forfeited orbital location and channel assignments. The Commission tentatively suggested that the Commission's auction authority under 47 U.S.C. 309(j) could be the most appropriate means of assigning reclaimed or unused DBS spectrum, but it deferred that issue to a separate notice-and-comment rulemaking proceeding. Pet. App. 51a-52a (¶¶ 72-74).

Commissioners Ness and Chong each filed separate statements joining in the Commission's decision. See Pet. App. 57a-59a, 60a-63a. Commissioners Barrett

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[2] The Commission added that the proposed transfer to TCI would be "futile" in any event under the existing FCC rule (47 C.F.R. 100.19) that any transferee must be held to the same due diligence deadlines as the transferor. Pet. App. 36a (¶ 42); see also *Jefferson Radio Co.* v. *FCC*, 340 F.2d 781 (D.C. Cir. 1964) (cited at Pet. App. 36a n.84).

and Quello filed separate dissents. See *id.* at 64a-70a, 71a-78a.

c. Two weeks after denying petitioner's extension application, the Commission initiated a rulemaking proceeding to determine the appropriate method for assigning reclaimed or unassigned DBS channels. See *In re Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking*, 11 FCC Rcd 1297 (1995). After notice and comment, the Commission unanimously determined that, as a general matter, public auctions are the best means of achieving that objective. See *In re Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order*, FCC 95-507 (Dec. 15, 1995), petition for review pending, *DIRECTV, Inc.* v. *FCC*, Nos. 96-1001, et al. (D.C. Cir.).[3] On January 26, 1996, the Commission held an auction for reassignment of petitioner's former spectrum. MCI Communications Corp. (MCI) won assignment of some of the reclaimed spectrum with a bid of $682.5 million; EchoStar won assignment of the remaining spectrum with a bid of $52.3 million. C.A. App. 893-894.

4. In a brief, unpublished order, the court of appeals affirmed the Commission's order denying petitioner's request for a second extension and reclaiming petitioner's DBS channels and orbital location. Pet. App. 1a-9a. In rejecting petitioner's argument that the Commission had granted other extensions on

[3] In separate statements, Commissioners Quello and Barrett concurred in the decision to use auctions for assigning reclaimed or unused spectrum in the future, but objected to auctioning petitioner's former spectrum on the theory that the Commission had improperly denied petitioner's request for a second extension of its construction permit.

similar facts, the court closely examined the prior Commission decisions at issue and concluded that each was fully consistent with the decision under review. *Id.* at 6a-8a. The court also rejected petitioner's argument that the Commission had departed from its stated goal of ensuring the prompt initiation of DBS service; instead, the court observed that the Commission's decision reflected its interest in maintaining the credibility of its due diligence policy. *Id.* at 8a. "Although enforcement of the due diligence rules may cause delays in the provision of a particular DBS system, the Commission's anti-warehousing policy relies on the enforcement of its due diligence obligations; otherwise, it could not ensure the prompt delivery of DBS service as a general matter." *Ibid.*

Finally, the court rejected petitioner's claim that the Commission had violated 47 U.S.C. 309(j)(7)(A) by supposedly allowing the expectation of auction revenues to play a role in its decision that petitioner had violated the Commission's due diligence requirements. Pet. App. 9a. The court noted that

> the Order does not base its denial of [petitioner's] renewal application on the expectation of such revenues. Rather, the Commission's decision was predicated on [petitioner's] failure to achieve "any concrete progress toward the actual construction and operation of its DBS system" during its first extension period.

Ibid. With respect to petitioner's claim that the Commission had based its order on "some alleged illicit motivation" rather than on the reasons set forth in the order itself, the court found that petitioner had failed to make the requisite factual showing to overcome the "strong" presumption of regularity in

agency decisionmaking. *Ibid.* The court expressed no opinion on the correctness of petitioner's contested interpretation of Section 309(j)(7)(A). *Ibid.*

ARGUMENT

The petition presents two questions (see Pet. i): first, whether "heightened scrutiny" is applicable in judicial review of agency decisions that may have the ultimate effect of conferring a financial benefit on the government; and, second, whether the court of appeals erred, as a factual matter, in determining that the order under review here was based on the Commission's stated reasons rather than on unstated, impermissible reasons. Neither question warrants this Court's review.

1. a. A decision of an administrative agency is ordinarily deemed to rest on the grounds stated by the agency itself; "there must be a strong showing of bad faith or improper behavior" before a court will permit "inquiry into the mental processes of administrative decisionmakers." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971); see also *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941). "Without a showing to the contrary," administrative decisionmakers "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975) (quoting *Morgan*, 313 U.S. at 421); accord *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965).

The court of appeals followed that presumption of administrative regularity here, and it found, as a factual matter, that petitioner "ha[d] pointed to nothing in the record that is sufficient to overcome the strong presumption of agency regularity." Pet. App. 9a

(internal quotation marks omitted). Apart from its factual challenge to that determination, which we address below (pp. 16-19), petitioner claims that, despite this Court's general prohibition on "inquir[ing] into the mental processes of administrative decision-makers," *Overton Park*, 401 U.S. at 420, the court of appeals should have subjected the Commission's decision to "heightened scrutiny, given the agency's interest in reclaiming [petitioner's] spectrum so that it would be available for auction." Pet. 14.[4]

Petitioner's argument for heightened scrutiny is without precedent and without merit. Petitioner cites no authority for its suggestion (see Pet. 15) that the general rule of judicial deference to administrative decisions, see, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inapplicable where the administrative order under review could result in a pecuniary gain for the government. Because agency actions commonly implicate an agency's budgetary interests, any "exception" to settled principles of deference based on an agency's alleged pecuniary motives would be broad and exceptionally difficult to apply. That is perhaps one reason why this Court and other courts have not recognized (much less addressed) any such exception even in cases in which that exception would appear, under petitioner's theory, to be applicable. See, *e.g.*, *United States* v. *Boyle*, 469 U.S. 241, 246 n.4 (1985)

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[4] Petitioner contends that application of that "heightened" standard of review would "likely" have led to the invalidation of the Commission's order. Pet. 22. The petition does not set forth the argument on the merits that, according to petitioner, would "likely" prevail under heightened scrutiny; indeed, petitioner insists that, "[f]or present purposes, the fine points of [that] argument are not important." *Ibid.*

(applying *Chevron* deference to IRS interpretation of Internal Revenue Code); *American Medical Ass'n* v. *Reno*, 57 F.3d 1129, 1135 (D.C. Cir. 1995) (noting government's entitlement to "sound amount of deference" in determining scope of agency program that small segment of population must subsidize by means of user fees); *Florida Power & Light Co.* v. *United States*, 846 F.2d 765, 770 (D.C. Cir. 1988) (similar), cert. denied, 490 U.S. 1045 (1989); see also *Lincoln* v. *Vigil*, 508 U.S. 182 (1993) (denying judicial review altogether of agency decision to discontinue certain benefits); *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 222-223 (1989) (rejecting argument favoring "the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power").

b. Because there is no support for petitioner's position in cases interpreting the Administrative Procedure Act, petitioner invokes a number of cases (see Pet. 15-19) in which this Court has held that, in some circumstances, constitutional principles of due process bar interested individuals from adjudicating certain kinds of disputes. The Court's principal concern in those cases has been to assure the "neutrality" of adjudicators, *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980), in circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Withrow*, 421 U.S. at 47.

As an initial matter, petitioner did not present this due process claim to the court of appeals, and it is therefore not properly before this Court. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the due process decisions upon

which petitioner relies are inapposite. In each case, the adjudicator faced direct, obvious, and enormous financial incentives to skew the outcome of adjudication. See, *e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (mayor received part of his compensation out of any fines he assessed); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (fines assessed by mayor went directly to the city's general revenue and constituted between one-third and one-half of the city's annual revenue); see also *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (potential personal liability of trustees created risk of bias).

That concern is absent here. First, the Commission may retain from auction revenues only the sums necessary to recover its "costs of developing and implementing" the auction program itself, subject to approval by the Office of Management and Budget (OMB). See 47 U.S.C. 309(j)(8)(A) and (B).[5] All other proceeds are deposited into general treasury funds, of which the auction proceeds at issue here constitute a minuscule fraction. Moreover, the due process decisions cited by petitioner generally addressed the potential bias of sole decisionmakers acting in an informal setting, often without meaningful review, and subject to potentially unchecked and undetectable

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[5] See 47 U.S.C. 309(j)(8)(B) (retained auction funds shall be "subject to the terms and conditions of the receiving appropriations account"). The FCC includes its "auction earned reimbursables" in its annual "Apportionment and Reapportionment Schedule" pursuant to OMB Circular No. A-34. See 31 U.S.C. 1513(b)(1) (apportionments for each federal executive agency shall be made in writing); Exec. Order No. 11,541, 35 Fed. Reg. 10,737 (1970) (delegating to Director of OMB responsibility for making apportionments).

financial pressures. Here, by contrast, the decision-maker at issue is a multi-member federal commission bound by the full panoply of administrative procedural requirements, including the requirement that it base its decisions on findings supported by substantial evidence and subject to judicial review. Under these circumstances, the due process concerns untimely invoked by petitioner are inapposite. See *Marshall*, 446 U.S. at 250-252 (rejecting due process claim on analogous facts).

c. Petitioner also appears to argue (see Pet. 13-14) that 47 U.S.C. 309(j)(7)(A)—which precludes the Commission from considering potential auction revenues in certain circumstances—requires heightened scrutiny of any Commission decision that might create such revenues. That argument is without merit. Even if Section 309(j)(7)(A) could be construed to affect the standard of judicial review in any context, which it cannot, it would be inapplicable here. Section 309(j)(7)(A) provides:

> In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

By its terms, this provision precludes the Commission from relying on expected auction revenues only in dividing the electromagnetic spectrum among various potential uses (pursuant to Section 303(c))

and in promulgating regulations governing that division of spectrum (pursuant to Section 309(j)(4)(C)). Thus, regardless of the effect of Section 309(j)(7)(A) on the Commission's decision to allocate unassigned DBS spectrum by means of an auction—an issue pending in the D.C. Circuit, see *DIRECTV, Inc.* v. *FCC*, Nos. 96-1001, et al., and not now before this Court—that provision has no bearing on the prior and distinct Commission determination under review here: the determination that petitioner had failed to proceed with diligence in constructing its DBS system and had therefore forfeited its channel and orbital position assignments. See 47 U.S.C. 309(j)(6)(C) (nothing in Section 309(j) shall be construed to "diminish the authority of the Commission under the other provisions of [the Communications Act of 1934] to regulate or reclaim spectrum licenses").[6] In any event, as the court of appeals found

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[6] Petitioner's contrary position would have serious consequences beyond this case. Many FCC licenses, including licenses assigned by auction, are issued subject to performance conditions similar to the due diligence requirement for DBS licenses. See, *e.g.*, 47 C.F.R. 24.203, 24.843. The Commission regularly enforces such conditions by license termination or refusals to extend construction permits, see, *e.g.*, *P & R Temmer* v. *FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984), and has already cancelled and re-auctioned several licenses for the provision of non-DBS services for failure to comply with those conditions, see, *e.g.*, *In re Reauction of Defaulted PCS C Block Licenses*, DA 96-1061 (June 28, 1996); *In re Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction filed by BDPCS, Inc.*, DA 96-811 (May 20, 1996), recon. denied, DA 96-874 (May 30, 1996). Under petitioner's reading of Section 309(j)(7)(A), each of those enforcement decisions would be subject to extraordinary judicial scrutiny to ferret out any alleged financial

and as discussed below, petitioner has made no showing that the Commission based that determination on the prospect of auction revenues or any other consideration not set forth in the order under review.

2. Apart from its novel proposal for "heightened scrutiny" of administrative actions that could result in a pecuniary gain for the government, petitioner challenges the court of appeals' determination (see Pet. App. 9a) that the order under review did not, in fact, rest on unstated, improper considerations. That factbound challenge is without merit.

The court of appeals determined that the Commission had articulated persuasive reasons for distinguishing petitioner's case from several other cases in which the Commission had granted extensions of due diligence deadlines for other DBS permittees, each of which, the court agreed, had made significantly more progress than petitioner toward the construction of an operable DBS system. See Pet. App. 6a-9a. Petitioner does not squarely challenge that determination in this Court. See Pet. 22 ("For present purposes, the fine points of Advanced's argument are not important."). Instead, petitioner appears to argue that, even if the Commission did articulate a reasonable basis for distinguishing its decisions regarding other DBS permittees, its order cancelling petitioner's permit is nonetheless invalid because the "true" motivation for that order was an unarticulated and impermissible desire to increase auction revenues.

"motivation" behind the decision, regardless of the Commission's stated basis for its decision. In drafting the narrow provision of Section 309(j)(7)(A), Congress did not intend to create such an unworkable scheme.

The court of appeals based its refusal "to search beyond the text of the Order" on a factual determination that petitioner "ha[d] pointed to nothing in the record that is sufficient to overcome the strong presumption of agency regularity." Pet. App. 9a (internal quotation marks omitted).[7] Petitioner's attempt to relitigate that same factual issue in this Court is without merit. As the court of appeals recognized (*id.* at 8a-9a), the Commission's decision rested on the need to develop a credible enforcement policy "to pre-

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[7] Although the dissenting Commissioners disputed the Commission's conclusions on the merits, they did not claim that those conclusions rested on considerations not set forth in the Commission's written order. See Pet. App. 68a-74a. Moreover, Commissioner Barrett did not say that he was asked whether MCI's proposed bid changed his mind regarding the merits of petitioner's due diligence showing; rather, he was asked only whether that bid changed his mind on whether auctions were the most appropriate means of reassigning those channels once they were reclaimed. See C.A. App. 160 n.5. Similarly, it was in the context of noting its tentative support for auctions, before initiating the rulemaking proceeding that resolved the issue, that the Commission majority noted MCI's letter indicating an interest in bidding at such an auction. Pet. App. 48a n.127.

Also without substance are petitioner's references (Pet. 6-7, 12, 24-25) to Chairman Hundt's public statements regarding the FCC's fulfillment of Congress's mandate that the Commission seek "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use." 47 U.S.C. 309(j)(3)(C). With only one exception, petitioner cites statements referring to the Commission's overall auction performance, which covers several different communications services and spans a three-year period. The only specific reference to the January 1996 DBS auction (see Pet. 12) made no reference to the only determination at issue here: the Commission's finding that petitioner had not proceeded with due diligence in constructing its own DBS system.

vent the 'warehousing' of spectrum," not on a covert wish to increase auction revenues. Indeed, as noted above, the Commission cancelled petitioner's DBS permit for noncompliance with due diligence requirements before the Commission had even begun rulemaking proceedings—now the subject of separate litigation to which petitioner is not a party—on the appropriateness of using auctions to allocate unassigned DBS channels and orbital slots. See *DIRECTV, Inc.* v. *FCC*, *supra*; see also Pet. App. 47a-48a (¶¶ 65-66). Thus, even if the outcome of the auction rulemaking is ultimately vacated by the court of appeals, the separate decision revoking petitioner's DBS permit will stand, and the spectrum will be allocated by another method. See C.A. App. 238 (¶ 152).

Nor is there any basis for petitioner's claim that congressional pressure improperly influenced the FCC's due diligence decision.[8] As petitioner concedes (see Pet. 25 & n.16), just after the order denying petitioner's construction extension, and around the

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[8] In the court of appeals, petitioner based much of its argument concerning congressional pressure on *ATX, Inc.* v. *United States Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994). In that case, the D.C. Circuit noted that, where an agency "suddenly * * * reverse[s] course or reach[es] a weakly-supported determination" in the face of congressional pressure, "we might infer that pressure did influence the final decision." *Id.* at 1529. After the panel issued the decision below, petitioner (unsuccessfully) sought rehearing and rehearing en banc principally on the ground that the panel had impermissibly departed from *ATX*. Petitioner has no basis for asking this Court to address the same factbound allegations of congressional influence that the D.C. Circuit found inadequate under that court's own applicable precedent.

time of the subsequent auction rulemaking proceeding, the Commission *granted* four DBS construction permit extensions, finding due diligence in each case. If, as petitioner claims, the FCC had permitted Congress's desire for more auction revenues to taint its due diligence findings, it would have reclaimed the spectrum of those permittees—as petitioner in fact urged it to do, see *In re EchoStar Satellite Corp.*, 11 FCC Rcd 3017, 3018 (¶ 10) (1996)—to make additional spectrum available for reassignment at the January 1996 auction. Instead, however, the FCC granted extensions to the permittees, noting the differences between their comparatively diligent performance and petitioner's utter failure, notwithstanding its four-year extension period, to make any concrete progress toward the construction of its own DBS system. See *id.* at 3018-3019 (¶ 14).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

WILLIAM E. KENNARD
General Counsel

CHRISTOPHER J. WRIGHT
Deputy General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

STEWART A. BLOCK
Counsel
Federal Communications Commission

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